United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-6081

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6081

PHILIP MORRIS INCORPORATED,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6085

R. J. REYNOLDS TOBACCO COMPANY,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6088

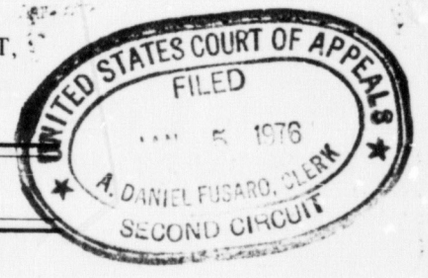
LOEW'S THEATRES, INC.,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6087

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK



PETITION FOR REHEARING

(Continued on Inside Cover)

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellees.

75-6090

LIGGETT & MYERS INCORPORATED,

Plaintiff-Appellant

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants-Appellees.

75-6089

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

PETITION FOR REHEARING

To The Honorable Judges of The United States Court of Appeals for the Second Circuit

Introduction

Plaintiff-appellant American Brands, Inc. ("American") respectfully petitions this Court pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing to reconsider the decision of this Court entered on December 22, 1975.

The Decision

On December 22, 1975, a panel of this Court (Mulligan, Oakes and Meskill, CJs) rendered a decision affirming the decision of the district court (Tenney, DJ) denying American's application for a stay of the accrual of statutory penalties under Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), pendente lite.

The Court, in affirming, held that plaintiffs-appellants were not entitled to a stay as a matter of law (p. 7*) and that under the standard for a preliminary injunction had not shown that the equities tipped decidedly in their favor (p. 12).

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* Page references are to typewritten opinion.

The Court found that the plaintiffs were not entitled to a stay as a matter of law on two grounds. The Court first held that the Young line of cases* cited by plaintiffs were limited to situations where a petitioner was not given the opportunity to challenge the initial validity of an administrative order and did not apply to subsequent administrative interpretations of a valid order (p. 8). Secondly, the Court stated that the penalties provided for in Section 5(l) were fair and not violative of due process under the two standards enunciated in United States v. ITT Continental Baking Co., 420 U.S. 223, 232-33 (1975) (p. 10).

The Court also held that the equities did not tip decidedly in favor of the plaintiffs because the Section 45(l) penalties were subject to mitigation in any enforcement action (p. 12) and because of the public interest in receiving adequate warnings about cigarette smoking (pp. 12-13).

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* Ex Parte Young, 209 U.S. 123 (1908); Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651 (1915); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920); and St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).

Reasons for Granting Rehearing

American respectfully submits that the Court misapprehended or overlooked a number of crucial points of fact and failed to give sufficient weight to the authority cited by American in support of its position, especially Rettinger v. FTC, 392 F.2d 454 (2d Cir. 1968), in arriving at its decision. As discussed below, these points of fact and law significantly affect the correctness of the Court's decision and require that the Court grant American's petition for rehearing.

1. The FTC Refusal to Permit American to Come into Compliance Until American had Capitulated by Paying an Enormous Tribute to the Commission

At page 4 of its opinion, the Court stated in passing that "[t]he companies claim that the FTC demanded too high a sum as a penalty for past violations. . . ." This statement seriously misconstrues and overlooks a crucial point of fact in this action. Throughout the Federal Trade Commission ("FTC") investigation into American's compliance with the Consent Order, American attempted to obtain specification of the advertisements which the Staff claimed violated the Order and to discuss what measures American should take to avoid alleged violations in future advertising. The Staff refused to discuss these basic points unless American paid monies of upwards of

$1,000,000 as penalties for unspecified violations or "a substantial amount that would hurt," in total disregard of the purposes and intent of the FTC Act.* (American Verified Cplt. ¶ 45, A117**; App. Brief at 7; Reply Brief at 3). No one should be forced to pay tribute to the FTC in order to obtain specification and advice as to ways and means of coming into compliance with an FTC interpretation of an order.

2. The FTC's Refusal to Specify Alleged Violations

When the FTC made its determination that American had violated the Order, the August 1, 1975 letter did not identify the advertisements which the Commission deemed violative nor did it indicate what measures American could or should take to bring its

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* "It must be kept in mind that the 'Federal Trade Commission Act is not a revenue-raising or penal measure . . . .'" United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2d Cir. 1966). "[R]eason and experience dictate that businessmen operating under the terms of a Commission order 'should be relieved insofar as possible of uncertainties with regard "to their enterprises and investments and a clear path indicated which they can travel without anxiety."'" Id. at 697 (citation omitted).

** A117 refers to pages of appellants' appendix. App. Brief refers to the Joint Appeal Brief of Plaintiffs-Appellants. Reply Brief refers to the Supplemental Reply Brief of Plaintiff-Appellant, American Brands, Inc.

advertising into compliance. (A164-166) This lack of specificity, considered against the detailed requirements of the Consent Order (A146-152), left American in the untenable position of not being able to correct its advertising to avoid the ever accumulating § 45(l) penalties (American Verified Cplt. ¶ 51, A120; Reply Brief at 4).* The FTC made it impossible for American to comply with the Commission's interpretation of the Order.

This action by the Staff and Commission was never considered by the Court in its opinion. Had it been considered, it would have affected the outcome of the Court's decision. In holding that American was not entitled to a stay as a matter of law, the Court relied on the criteria stated in United States v. ITT Continental Baking Co., 420 U.S. 223, 232-33 (1975) as the basis for its finding that § 45(l) cumulative penalties are not violative of due process under the circumstances of this case" (p. 10) (emphasis added). Those criteria include that § 45(l) penalties

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* The Rubin affidavit (A217-28), based on information and belief by a person who had no connection with the events until January 1975 (A218) and served on American on the day of oral argument in the court below (A283), characterizes the facts otherwise. The Austern (A302-14) and Kornegay (A498-501) affidavits, filed after the decision below, take sharp issue with Mr. Rubin's statements and support the facts as stated in American's Verified Complaint (A104-22).

are fair "where there exists a continuing ability on the part of the violator to eliminate the effects of his violation if so motivated." (p. 10) However, it is clear that because of the unjustifiable position taken by the Staff and because of the obvious inadequacy of the notice claimed to be given to American by the FTC in its August 1, 1975 letter, American could not eliminate the effects of its violations because it did not know what the violations were! Under these circumstances, § 45(l) penalties do not act as a deterrent to violation and have no legitimate justification. Only by means of a stay can American meaningfully and practically challenge the FTC's unwarranted and calculated abuses.

The failure to consider this crucial fact also negates the Court's finding that the equities do not tip decidedly in American's favor and this standard must be reapplied by the Court in light of the true circumstances.

3. The In Terrorem Effect of the "180 Day" Items in the August 1, 1975 Letter

The FTC, in the August 1, 1975 letter, also found that American had violated the Order with respect to billboards, transit cards and typography, but stated that it would not initiate a civil penalty action for a

period of "180 days from receipt of this order" (A166). The in terrorem effect of these "180 day" items was even greater than the other alleged violations found. Unless American immediately capitulated on the "180 day" items, incredible penalties would accrue during this period while leaving the FTC to act on its own leisurely time schedule. Neither the Court nor American knows when the FTC may bring suit.* This fact should have been, but was not, considered by the Court in arriving at its decision.

4. The Categorization by the Court of the August 1, 1975 Letter

In its opinion, the Court characterizes this litigation as being "at the compliance or enforcement stage" (p. 8) and does not consider the force and effect of the FTC's August 1, 1975 letter. It would be one thing if the FTC, instead of making the August 1, 1975 determination, had immediately caused a penalty action to be filed. Under those circumstances, American could immediately challenge the sufficiency of the complaint and obtain a stay of penalties pending the

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* The "180 day" items have not as yet been included in the enforcement action in the District of Columbia (Reply Brief, Addendum B).

Court's decision. Ford Motor Co. v. Coleman, 75 Civ. 1340 (D.D.C , Sept. 22, 1975) at 2. It is quite another matter for the FTC to make a formal determination, then delay in taking any action, while forcing American to proceed at its peril. On August 15, 1975 when American brought its declaratory judgment action, this controversy was not at the enforcement stage and was not to be so until November 19, 1975 when American was served with process in the government's enforcement action in the District of Columbia*.

It is submitted that the Court in its decision did not consider the August 1 letter for what it was. It was a final administrative order,** declaratory in form, with its own force and effect, totally separate and apart from the underlying Consent Order upon which it was ostensibly based. In fact, the letter itself states it is an order. (A166)

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* If American's motion in the District of Columbia action to dismiss for lack of personal jurisdiction and improper venue is successful, the "enforcement stage" will again have been delayed by the FTC, this time due to forum shopping.

** Cf. 5 U.S.C. § 551(6), which defines an order, for the purposes of the Administrative Procedure Act as:

> "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency . . . ."

The true nature of such agency action has been previously recognized by this Court in Rettinger v. FTC, 392 F.2d 454, 456 (2d Cir. 1968), in a case in which this Court "reluctantly" concluded that it did not have jurisdiction to consider petitioner's claim that a subsequent "interpretation" of a consent order by the FTC, with its accompanying severe civil penalties, was an attempt to coerce petitioner's conduct without the requisite due process. The Court in Rettinger, on facts less compelling than those here, indicated a strong desire to grant review and in dismissing the action, without prejudice to Rettinger renewing his request in the district court, stated:

> "[w]e are aware that it is possible for petitioner to await a civil suit by the Commission to enforce its present interpretation of the 1956 order. In view of the financial risks involved, we understand why Rettinger would rather avoid this course . . ." 392 F.2d at 457 (emphasis added)

thus intimating that district court review was available without the risk of the accumulation of § 45(l) penalties. Such review can only be had by the granting of a stay.

The FTC itself has acknowledged the propriety of granting a stay in challenges of such agency action. For example, in connection with the line of business reports, the Commission, on December 19, 1975,

issued a statement wherein it stated that companies challenging the right of the FTC to require line of business reports could, if the Commission issued a notice of default for failure to file a report (which notice in and of itself has no immediate legal effect and is akin to the August 1 letter here, see 15 U.S.C. § 50), "seek to stay the accumulation of penalties. See St. Regis Paper Co. v. United States, supra, 368 U.S. at 226-227; Aluminum Co. of Am. v. FTC, 390 F. Supp. 301, 309 (S.D.N.Y. 1975)."*

When the August 1 letter is considered in its proper perspective, the Young, Wadley, Love and St. Regis cases, which the Court stated "establish that one has a due process right to contest the validity of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost" (p. 7), are clearly applicable and require reversal of the district court's decision.

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* Statement of the Commission on Motions to Quash the Orders to File the 1974 Line of Business Form, December 19, 1975 at 18.

5. The Public Interest

In finding that American had not shown that the balance of hardships tipped decidedly in its favor, the Court relied heavily on a finding that the warning statement "substantially affects the public interest" (p. 13).

It is significant to note that the FTC was not concerned with the claimed public interest during this controversy. If the violations existed from the date of the order, as claimed by the government (A225), why then were the compliance reports accepted (A223, A114) particularly since the FTC had stated that it would carefully monitor compliance (A113)? Why did the FTC twice report to Congress that American was in compliance (A115)? Why, during a one and one-half year investigation, did the Staff refuse to specify violations or give American any guidance as to compliance, without first demanding penalties (A117), if their purpose was to insure that the public received adequate warning? Why was the August 1 letter so vague and indefinite (A164-166), if its purpose was to bring American into compliance in the public interest? Why did the FTC delay in initiating an enforcement action? Why did the FTC delay for a month thereafter service on American?

Only after American filed the action below to force a prompt resolution of this controversy, which is surely in the public interest, did the FTC for the first time claim that the public interest would suffer.

In light of these facts, the Court should review its decision and in so doing: (1) consider the untenable position in which American was placed both by the refusal of the FTC to specify violations and by the August 1 letter; (2) take into account the delay in the resolution of this controversy caused by the FTC (pp 3-6, supra; Reply Brief at 4-5); and (3) recognize the public interest argument of the government for what it is, i.e., a red herring. It is submitted that on such a consideration, the Court will find that the equities tip decidedly in American's favor.

Conclusion

For reasons stated above, this petition for rehearing to reconsider the decision of this Court

entered on December 22, 1975 should be granted and the judgment of the district court should be reversed.

Respectfully submitted,

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